Mailed: December 22, 2004
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UNITED STATES PATENT AND TRADEMARK OFFICE

Trademark Trial and Appeal Board

Hamptons United Multimedia Productions, Inc.
v.
Faro Media, Inc.

Opposition No. 91153610 to application Serial No. 76134926 filed on September 25, 2000

Mark M. Kratter of Law Offices of Mark M. Kratter for Hamptons United Multimedia Productions, Inc.

Terence A. Dixon of Dechert LLP for Faro Media, Inc.

Before Hohein, Chapman and Bottorff, Administrative Trademark Judges.

Opinion by Hohein, Administrative Trademark Judge:

Faro Media, Inc. has filed an application to register the mark "HAMPTONS STYLE" for "general interest magazines concerning luxury lifestyles in East Hampton, Southampton and surrounding communities in New York."[1]

Hamptons United Multimedia Productions, Inc. has opposed registration essentially on the grounds that opposer, rather than applicant, is the owner of the mark "HAMPTONS STYLE"

[1] Ser. No. 76134926, filed on September 25, 2000, which is based on an allegation of a bona fide intention to use such mark in commerce. The word "HAMPTONS" is disclaimed.

for magazines inasmuch as opposer, *inter alia*, has been using such mark "since March 3, 2000[,] which is when it was published on the website netStyleTV.com and published in Advertising Media Kits"; that "[o]n May 28, 2000, the Mark further appeared in the following magazines: Dan's Papers; Hamptons Country Magazine; and Hamptons Magazine"; that, on the same date, "press releases were sent to all major media"; that "Joseph DeChristofaro of Faro Media, Inc. was the publisher of Hamptons Country Magazine on May 28, 2000; that such date is "when he first saw the Mark 'Hamptons Style'"; that "[h]e simply copied the Mark"; that opposer will "not be entitled to register the Mark 'Hamptons Style' if Faro Media, Inc. obtains registration of same"; and that confusion will be likely "if two separate entities publish a luxury lifestyles magazine ... using the same Mark."

Applicant, in its answer, has admitted that "Joseph DeChristofaro was the publisher of a magazine entitled *Hamptons Country*"; that "if Applicant's application matures into a registration, it is likely that the U.S. Patent and Trademark Office would refuse registration to a subsequent application for registration of HAMPTONS STYLE by Opposer for the same or similar goods"; and that "consumers might be confused as to the origin, sponsorship, approval of or the affiliation, connection, association between two luxury lifestyles magazines published by two different entities which are distributed in the same geographic locale under the same title"; but otherwise has denied the remaining salient allegations of the opposition.

The record consists of the pleadings; the file of the involved application; and, as opposer's case-in-chief, notices of reliance on newspaper and magazine excerpts.[2] Applicant did not take testimony or otherwise submit any evidence. Both parties have filed briefs,[3] but an oral hearing was not requested.

The principal issue to be determined herein, since both parties claim to possess prior rights in the same mark for the same goods, is which party is the owner of the mark "HAMPTONS STYLE" for general interest magazines concerning luxury lifestyles in East Hampton, Southampton and surrounding communities in New York.

Opposer asserts in its brief that, based on the evidence of record, it "has demonstrated that it clearly used the mark [at issue] in interstate commerce prior to the application [filing] date of the applicant," which provides a date of constructive use of September 25, 2000. Such date, we note, is the earliest date upon which applicant can rely in this

[2] While opposer also submitted a notice of reliance on its "Media Kit" advertising, such evidence was stricken from the record by the Board on February 9, 2004, pursuant to applicant's uncontested motion to strike such notice, as constituting improper subject matter for a notice of reliance under Trademark Rule 2.122(e).

[3] Although applicant, in its brief, contends among other things that, as to the newspaper and magazine excerpts submitted with opposer's two remaining notices of reliance, "it is far from clear that these materials are admissible in this proceeding," the procedural objections asserted by applicant pursuant to Trademark Rule 2.122(e) (e.g., failure to submit a copy of the publication) are considered to have been waived. Applicant failed to seasonably raise such objections at a time which, if such were considered to be valid, opposer would have been permitted an opportunity by the Board to cure the alleged deficiencies with respect to its notices of reliance. See TBMP §§532 and 707.02 (2d ed. rev. 2004). Accordingly, no further consideration will be given to the procedural objections asserted by applicant in its brief.

proceeding since there is no testimony or other proof as to any actual use of the mark "HAMPTONS STYLE" by applicant. See, e.g., Lone Star Mfg. Co., Inc. v. Bill Beasley, Inc., 498 F.2d 906, 182 USPQ 368, 369 (CCPA 1974); Columbia Steel Tank Co. v. Union Tank & Supply Co., 277 F.2d 192, 125 USPQ 406, 407 (CCPA 1960); Zirco Corp. v. American Tel. & Tel. Co., 21 USPQ2d 1542, 1544 (TTAB 1991); and Miss Universe, Inc. v. Drost, 189 USPQ 212, 213 (TTAB 1975). In particular, opposer contends that the record shows that it "used the Mark 'Hamptons Style' in interstate commerce by publishing the Mark 'Hamptons Style' in Dans Papers News Papers and Hamptons Country Magazine in May and June of 2000,"[4] respectively, and that such publications "are available in libraries and are generally circulated to members of the public." Opposer accordingly insists that "it is the opposer and not the applicant that should be allowed to register the Mark 'Hamptons Style'" and that, obviously, "it is confusing to the public for two different entities to use the same trademark ... in the same marketplace" for the same goods.

We agree with applicant, however, that as set forth in its brief, the evidence of record fails to establish that opposer has superior rights to the mark "HAMPTONS STYLE" for lifestyle magazines. Specifically, as applicant persuasively points out, "there is nothing in the record to support Opposer's claim that

[4] Applicant, in its brief, accurately points out that while opposer, in its brief, also maintains that it "used the Mark 'Hamptons Style in interstate commerce by publishing the Mark 'Hamptons Style' in the Hamptons Style Media Kit of February of 2000," such evidence, as noted previously, has been stricken from the record. No consideration, therefore, has been given thereto.

it has prior rights in the mark" inasmuch as, with respect to the one-page excerpt from the Memorial Day 2000 issue of "Dans Papers Newspapers":

> [T]he document ... does not establish that Opposer used the mark ... as a mark on a rival lifestyles magazine. The text of this single page -- which appears to be either an article or possibly a paid advertisement -- focuses primarily on a video project entitled "Hamptons Video Guide" which is to be "archived on the new netStyleTV.com web site." The only references to "Hamptons Style" in the text is a statement that:
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> > With the launch of netStyleTV.com (Life styles of the world's premier destinations -- all based on the original Hamptons concept) producer Dee Du Bois has expanded the original production into a worldwide multimedia gonglomerate [sic], following the blueprints for Hamptons Video Guide, Hamptons Style (a new tie-in printed reference guide), Hamptons Television Network, and netStyleTV.com ... all registered trademarks of her new production company United Multimedia Productions, Inc. Local businesses and corporations can participate in the next release of the Hamptons Video Guide, Hamptons Style publication, television broadcasts, or get on the netStyleTV.com web site by calling United Multimedia Productions ....
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> That statement is certainly not valid evidence that Opposer has any rights in the HAMPTONS STYLE mark -- much less that Opposer made actual use of the mark ... on a luxury lifestyles magazine prior to the filing date of Applicant's application. .... [T]he only entity mentioned in the piece is not Opposer, Hamptons United Multimedia [Productions], Inc., but rather some company called "United Multimedia Productions, Inc." It is also not clear from the text that anyone -- let alone Opposer -- had actually

> published a publication under the title "Hamptons Style" as of the date when this article/advertisement was allegedly published.
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> Furthermore, to the extent that this piece makes any statement about use of the mark by anyone, it is plainly "a statement, other than one made by declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." Federal Rules of Evidence, Rule 801(c). .... Consequently, such a statement would be classic hearsay and inadmissible for the alleged truth of the matters contained therein unless a competent witness has testified to the truth of such matters. Federal Rules of Evidence, Rule 802; *see, e.g., Otis Elevator Co. v. Echlin Manufacturing Co.*, 187 U.S.P.Q. 310, 312 n.4 (TTAB 1975) (magazine article showed only that goods under the mark were the subject of an article in that publication); TBMP § 704.08 [(2d ed. rev. 2004)] and cases cited therein.
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> The only other use of HAMPTON [sic] STYLE in this submission is the inclusion of a stylized version of the term [(in the format "**Hamptons*Style***")] in the bottom left hand corner of the piece. Although this arguably might represent some form of "use" of the mark for advertisement purposes, it is plainly not use ... on the goods for which Opposer claims rights -- namely a lifestyles magazine. Nor does it establish that the mark was actually used on such goods by Opposer or anyone else prior to the filing date of Applicant's application.

Although we additionally observe, however, that the page from "Dans Papers Newspapers" actually contains two other instances in which the term "Hamptons Style" is used therein, it is still the case that none of the usages demonstrates technical trademark use of such term on or in connection with a lifestyle magazine of any sort. In particular, the article and/or advertisement, in referring to "the new netStyleTV.com web site,"

includes the following statement: "The web site's Hamptonian news reports which can be found in the Hamptons Style section of netStyleTV.com will feature investigative news stories, 'that none of the local papers and magazines will touch, because they're to [sic] controversial!' stated Ms. Du Bois." Such statement, like the statement which applicant discussed in its brief, fails to demonstrate use of "HAMPTONS STYLE" as a mark for a lifestyle magazine, whether published in printed or electronic form, and is inadmissible hearsay if considered for the truth of the content thereof. Moreover, while the article and/or advertisement contains a picture of "[m]ultimedia creator and producer Dee Du Bois" and refers to her in the caption thereof as "the genius behind netStyleTV.com[,] Hamptons Video Guide [and] Hamptons Style," such clearly is not use of "HAMPTONS STYLE" as a mark on or in connection with a lifestyle magazine or otherwise establish that opposer acquired superior rights as the owner of the mark prior to the filing date of applicant's application.

As to the remaining evidence introduced by opposer, which principally includes a one-page automobile advertisement,[5] we concur with applicant that, as persuasively stated in its brief (footnote omitted):

> The evidence submitted with the other Notice of reliance is equally unavailing. The material submitted consists of the cover and three inside pages from an issue of *Hamptons Country* magazine, dated June 2000.

[5] The advertising copy for such ad consists entirely of two lines, with the first reading "call 877 548-4336 FOR INFORMATIONON THE JAGUAR S-TYPE AND A TEST DRIVE complimentary video with test drive" and the second reading "**Hamptons*Style* HAMPTONS** VIDEOGUIDE **net*Style*TV.com**."

> The only page that shows the HAMPTONS STYLE mark is what appears to be an advertisement for JAGUAR cars. The mark appears in a stylized form [(i.e., "**Hamptons*Style***")] at the bottom on [sic] the advertisement. Nothing in the advertisement or in any of the other [three] pages submitted suggests that the advertisement was [placed or] submitted by or on behalf of Opposer. ....
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> Moreover, even if the advertisement were [placed or] submitted by or on behalf of Opposer, it is at most evidence of use of the mark in connection with the advertisement of automobiles. It does not support the contention that Opposer has used the mark in connection with a lifestyles magazine. Opposer is not the publisher of *Hamptons Country* magazine. As Opposer's submission demonstrates and as [Applicant has admitted in the answer and] Opposer has acknowledged [in its brief], that magazine was published by Applicant's president, Joseph DeChristofaro. See masthead on page 14 of submitted extract from *Hampton* [sic] *Country*. Thus, even if Opposer could establish a connection with the submission -- i.e. that it had included the mark in an advertisement for JAGUAR cars which it had inserted into a third party's magazine -- that does not constitute use in connection with its own lifestyles magazine.

Finally, as applicant also properly points out in its brief, the evidence made of record fails to constitute sufficient proof by opposer of prior use of the mark "HAMPTONS STYLE" which is analogous to trademark use. Specifically, as applicant persuasively notes (underlining in original):

> Nowhere in its Brief has Opposer argued that it had secured prior rights in the mark by virtue of any use that is analogous to trademark use. .... Opposer has not presented any testimony or other evidence to show that its alleged use created any prior public identification of the term with Opposer's product -- let alone that such use was of such a nature and extent to "have substantial impact on the purchasing public."

T.A.B. Systems v. PacTel Teletrac, 77 F.3d 1372, 1375-1377[, 37 USPQ2d 1879, 1881-83] (Fed. Cir. 199[6]).

Accordingly, because opposer, as the party bearing the burden of proof in this proceeding,[6] has failed to demonstrate that it is the owner of superior rights in the mark "HAMPTONS STYLE" for a lifestyle magazine, opposer cannot prevail on its claims herein.

Decision: The opposition is dismissed.

[6] See, e.g., Champagne Louis Roederer S.A. v. Delicato Vineyards, 143 F.3d 1373, 47 USPQ2d 1459, 1464 (Fed. Cir. 1998) (Michel, J. concurring); Yamaha Int'l Corp. v. Hoshino Gakki Co. Ltd., 840 F.2d 1572, 6 USPQ2d 1001, 1007 (Fed. Cir. 1988); Sanyo Watch Co., Inc. v. Sanyo Elec. Co., Ltd., 691 F.2d 1019, 215 USPQ 833, 834 (Fed. Cir. 1982); and Clinton Detergent Co. v. Proctor & Gamble Co., 302 F.2d 745, 133 USPQ 520, 522 (CCPA 1962). It remains opposer's obligation to satisfy its burden of proof, irrespective of whether applicant offers any evidence.